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March 31, 2004

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-B204
Washington, DC 20554

Re: ***Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Service Are Exempt from Access Charges***
WC Docket No. 02-361

Dear Ms. Dortch:

AT&T Corp. ("AT&T") submits this *ex parte* in response to those filed by UniPoint Enhanced Services, Inc. d/b/a/ PointOne ("PointOne") on March 3, 2004, and by WilTel Communications, LLC ("WilTel") on March 12, 2004, concerning whether access charges should apply to phone-to-phone IP telephony, an issue posed by AT&T's Declaratory Ruling Petition in this proceeding ("AT&T Petition").

WilTel and PointOne both appear to suggest that the Commission could treat "traditional interexchange carriers" that deploy a packet-based IP infrastructure for voice differently from all others that deploy a packet-based IP infrastructure for voice, requiring the former, but not the latter, to pay above-cost access charges. Acting in that manner would constitute patently unlawful Commission favoritism. Although both carriers acknowledge that the Commission could lawfully grant AT&T's request that the Commission reaffirm that phone-to-phone IP telephony services are "exempt" from access charges (and PointOne affirmatively endorses that result), *see Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd. 9610, ¶ 133 (2001) ("*Intercarrier Compensation NPRM*"), each suggests that if the Commission is inclined to deny AT&T's petition, it could punish only AT&T and make clear that other phone-to-phone IP telephony carriers remain exempt. Such rank singling out of carriers for favorable and unfavorable regulatory treatment could not possibly be sustained. As explained below, the arguments relied upon to draw regulatory distinctions between different phone-to-phone IP telephony providers are not legally sustainable. Moreover, if the Commission were to embrace these distinctions (in what would be a fairly obvious

attempt to harm AT&T relative to other IP telephony providers), phone-to-phone IP telephony would continue to avoid access charge liability going forward, as carriers that today employ disfavored configurations would have no choice but to switch to favored configurations (or watch all of their traffic convert to phone-to-phone IP traffic and migrate to carriers using the favored configurations). For example, AT&T acting as a LEC would be liable for access charges if it routed the end user's long distance voice traffic over its own IP infrastructure but would not be liable for access charges if it handed its LD bound traffic directly to an ESP IP transport company, such as PointOne or Transcom. Likewise, wireless carriers like Verizon Wireless or Cingular could simply hand their voice long distance traffic to a company like PointOne and never pay access charges. In short, one could hardly imagine a more arbitrary and discriminatory use of an agency's power or a more explicit picking of winners and losers in the competitive marketplace. Of course, the right answer is a Commission ruling that *all* phone-to-phone IP telephony services remain exempt from access charges. But if AT&T must pay access charges on its phone-to-phone IP telephony calls, then WilTel, PointOne, Transcom and others must pay as well.

The Proffered "Distinctions" Among Phone-To-Phone IP Telephony Providers Are Baseless. WilTel's *ex parte* offers three "scenarios" for providing phone-to-phone IP telephony that it claims are potentially subject to different treatment under the access charge rules. In all three scenarios, the calls originate over the PSTN in TDM format, are converted to IP and transported as such for some portion of the call, then reconverted to TDM format for delivery to the called party over the PSTN. In Scenario 1, a single company performs both conversions (TDM-to-IP, and IP-to-TDM). In Scenarios 2 and 3, the two conversions are split between two or more intermediate carriers. The only difference between Scenarios 2 and 3 is that in one case the intermediate carriers hold themselves out as IXCs, whereas in Scenario 3 at least one of the carriers holds itself out as an "enhanced service provider" (on the theory that that carrier, viewed in isolation, performs a "net" protocol conversion before handing the call off to another carrier).

Simply splitting the functions in a phone-to-phone IP call between two or more carriers can have *no effect* on the legal status of that communication or on whether access charges would apply. Accordingly, if the Commission finds that phone-to-phone IP telephony is subject to access charge payments (which, of course, it should *not* do), it must hold that "interstate access charges apply in every case involving an interstate, interexchange transmission from an originating end-user on the PSTN to a terminating end-user on the PSTN that doesn't meet the definition of 'information service,' regardless of how many parties are involved in the chain of transmission and the regulatory status of those parties." WilTel at 2.

The Commission has already recognized that phone-to-phone IP telephony services, by definition, involve the transmission of "information without change in

content or format" on an end-to-end basis. *Report to Congress* ¶ 88.[1] If AT&T's phone-to-phone IP services do not meet the definition of an information service, then no phone-to-phone IP services meet that definition (including services offered by companies such as Net-2-Phone and other VoIP pioneers, provided they do not otherwise enhance their service offerings). As the Commission has long held, "the definition of enhanced service does not reach protocol conversions which are performed internally to a carrier's network, and not manifested at the outputs of the network in end-to-end transmission." *Communications Protocols Order*, 95 F.C.C.2d 584, ¶¶ 1-5, 14 (1983). A service is enhanced whenever there is any "net *user-to-user* protocol conversion." *1987 Computer III (Phase II) Order*, 2 FCC Rcd. 3072, ¶ 71 (1987) (emphasis added); *see also Non-Accounting Safeguards Order*, 11 FCC Rcd. 21905, ¶ 106 (1996). Even if there are multiple carriers involved in the provision of a phone-to-phone IP call, and the two protocol conversions are performed by different carriers, it remains the case that no carrier performs a protocol conversion that results in a "net user-to-user protocol conversion." *Id.* Therefore, none of the intermediate carriers is providing an enhanced service, and none of the carriers is an enhanced service provider. Simply splitting the two protocol conversions between two carriers does not permit each one to claim the ESP exemption.[2]

Thus, any ruling that access charges apply depending on whether or not there are multiple IXCs performing protocol conversions would be wholly arbitrary and flatly

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[1] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11,501, ¶¶ 88-89 (1998) ("Report to Congress" or "Stevens Report"). The FCC defined phone-to-phone IP Telephony as a service that enables "real-time voice transmission using Internet protocols" (*id.* ¶ 84) and meets a four-part test:

> (1) the provider holds itself out as providing voice telephony or fax;
>
> (2) no special CPE is required beyond that used for calls over the PSTN;
>
> (3) the service allows calls to telephone numbers assigned under North American Numbering Plan and international agreements; and
>
> (4) the service transmits customer information without a net change in form or content. *Id.* ¶ 88.

[2] PointOne appears to be arguing that AT&T's status as an IXC would preclude it from being an enhanced service provider as well, and therefore if the ESP exemption did apply it could be limited to entities that are "purely" ESPs. *See* PointOne at 1 (the FCC should hold that "Rule 69.5 prevents a certified and traditional IXC such as AT&T from also making an affirmative claim that traffic that it (the IXC) terminates through any direct physical connection between AT&T controlled facilities and [ILEC] controlled facilities is exempt from access charges via a traditional ESP exemption"). The Commission has squarely rejected the identical claim elsewhere. *See Northwestern Bell Tel Co.*, Petition for Declaratory Ruling, Memorandum Opinion and Order, 2 FCC Rcd. 5986 (1987).

inconsistent with the Commission's existing rules. *See* WilTel at 1-2 (Scenario 2). The IXCs in the various scenarios are providing *identical* services (*i.e.*, phone-to-phone IP telephony), and radically different treatment of these two sets of carriers under the access charge rules would invite massive regulatory arbitrage. Courts have repeatedly held that agencies must justify disparate treatment of similarly situated parties, and there is no conceivable justification for treating IXCs carrying identical traffic differently merely because in one scenario two IXCs collaborate to perform the protocol conversions.[3] Indeed, such an outcome would be blatantly discriminatory, in violation of Sections 201 and 202 of the Act.[4]

The Commission Cannot Lawfully Single Out Carriers For Unfavorable Treatment. Favoring particular carriers with particular configurations would be arbitrary in ways that would be quite obvious to the court of appeals. Allowing certain smaller carriers to escape access charge liability would confer a significant and unwarranted competitive advantage on those carriers, even though their services are functionally identical to other phone-to-phone IP services. Courts have repeatedly held

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[3] *See, e.g., Adams Telcom, Inc.* v. *FCC*, 38 F.3d 576, 581 (D.C. Cir. 1994) ("We have . . . reminded the FCC of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment" (internal quotation marks omitted)); *Melody Music, Inc.* v. *FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965) (to justify disparate treatment of parties, FCC "must explain its reasons and do more than enumerate factual differences, if any, between [them]; it must explain the relevance of those differences to the purposes of the Federal Communications Act"); *FEC* v. *Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986) ("[A]n agency's unjustifiably disparate treatment of two similarly situated parties works a violation of the arbitrary-and-capricious standard.").

[4] Under Section 202(a) "like" services must be treated similarly. The "test of whether services are 'like' is functional similarity or equivalence." *Investigation of Special Access Tariffs of Local Exchange Carriers*, Tentative Decision, 8 FCC Rcd. 1059, ¶ 19 (1994) ("*SNFA Remand Findings*"). "This test looks to the nature of the service" to determine "whether the services are different in any material functional respect." *Id.* And the test considers whether services are functionally equivalent "from the perspective of consumers." *Id.* ¶ 20; *see also Ad Hoc Telecommunications Users Committee* v. *FCC*, 680 F.2d 790, 796 (D.C. Cir. 1982). In this regard, the D.C. Circuit and the Commission have emphasized that "the functional equivalency test should be allowed to yield a determination that . . . services are 'like,' whether or not they are 'identical.'" *SNFA Remand Findings* ¶ 20; *Ad Hoc* v. *FCC*, 680 F.2d at 797. The Commission has explained that discriminatory rates are unjust or unreasonable if they are not "justified by considerations such as differences in cost" or do not serve the "goals of the Act." *SNFA Remand Findings* ¶ 135. Disparate treatment of phone-to-phone IP telephony based on the number of providers involved would violate section 202(a) of the Communications Act because it would establish an unjust and unreasonable rate difference for like (in fact, identical) services.

that the Commission may not discriminate among similarly situated carriers merely to "aid the minnows against the trout, such as AT&T and MCI." *United States* v. *Western Electric*, 900 F.2d 1231, 1243 (D.C. Cir. 1992). *See also SBC Communications v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) ("[t]he Commission is not at liberty . . . to subordinate the public interest to the interest of equalizing competition among competitors"); *Competitive Telecommunications Ass'n v. FCC*, 87 F.3d 522, 531-32 (D.C. Cir. 1996); *Western Union Tel. Co.* v. *FCC*, 665 F.2d 1112, 1122 (D.C. Cir. 1981); *Hawaiian Tel. Co.* v. *FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974); *Bell Atlantic Mobile Sys., Inc. and NYNEX Mobile Communications Co.*, 12 FCC Rcd. 22,280, ¶ 16 (1997) (the "Commission's statutory duty is to protect efficient competition, not competitors").

Indeed, if the Commission were suddenly to "discover" these distinctions in its existing rules, the Commission would be prohibited from ordering *any* carrier to pay retroactive damages.[5] As these *ex partes* themselves make clear (*see* WilTel at 3), the Commission's existing rules do not clearly encompass such distinctions. The courts have consistently held that agencies are barred from ordering penalties to enforce regulations that were too vague or undefined to serve fair notice on parties of their consequences. *See, e.g., Trinity Broadcasting of Fla., Inc.* v. *FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) ("Because due process requires that parties receive fair notice before being deprived of property,' we have repeatedly held that in the absence of notice – for example, where the regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability. We thus ask whether by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform." (internal citations, quotation marks, and alterations omitted)); *General Elec. Co.* v. *EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). The Commission's orders recognize these due process rights, *see Complaints against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, File No. EB-03-IH-0110, Memorandum Opinion and Order, FCC O4-43, ¶ 15**,** rel. March 18, 2004, and they do not belong solely to rock stars and broadcasters.

Distinguishing Among Phone-to-Phone IP Providers Would Serve No Conceivable Purpose. If the Commission were to hold that AT&T's phone-to-phone IP telephony service is subject to access charges, then any further holding that certain configurations of phone-to-phone IP telephony are exempt would create a loophole that

[5] Indeed, the Commission's prior actions already foreclose the prospect of such liability. *See* Letter from Patrick H. Merrick, AT&T to Marlene H. Dortch, FCC, WC Docket No. 02-361, dated February 20, 2004; Letter from David L. Lawson, on behalf of AT&T to Marlene H. Dortch, FCC, WC Docket No. 02-361, dated December 22, 2003; Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Service are Exempt from Access Charges, WC Docket No. 02-361, filed October 18, 2002, at 1-17; Reply Comments of AT&T Corp., WC Docket No. 02-361, filed January 24, 2003, at 7-18.

would quickly swallow the rule. Indeed, WilTel itself acknowledges (at 3) that any rule that applies access charges based on whether or not a company "hands off" traffic to another provider would be a signal that firms "may avoid access charges by splitting their functionalities among companies." As WilTel freely admits, "this outcome would lead to massive migration of traffic away from any arrangements in which access charges apply, and into access charge-free arrangements." WilTel at 3. Carriers would hurriedly migrate their traffic to two-carrier configurations, in order to allow each carrier to take advantage of this new found "exemption." These loopholes would be wholly arbitrary and self-defeating. Indeed, adoption of such "exemptions" would make it all the more transparent that the only purpose of the exemptions was to punish disfavored carriers and to reward other similarly situated carriers.

Equally important, such favoritism would directly harm competition. Companies such as PointOne, Level 3 or others who may claim to be "enhanced service providers" are, in fact, "carriers' carriers" with whom AT&T competes head-on in the wholesale market. Thus, any disparate access treatment between AT&T and other entities that allege that they are not "traditional IXCs" would create a wholly arbitrary and capricious distinction in both the retail and wholesale markets, given that both AT&T and these other entities would be transporting the *identical* traffic. It is precisely this type of unreasonable discrimination that is prohibited under the Communications Act.

The Commission Should Resolve These Issues in the VOIP Rulemaking Proceeding. The best and most reasonable course of action would be for the Commission to consider the intercarrier compensation issues attendant to phone-to-phone IP telephony in its *VoIP NPRM*.[6] The Commission's longstanding policy that phone-to-phone IP telephony services are exempt from access charges was sound when developed – and remains so today. To subject IP-based services to inefficient charges would impede their development and risk unlawful discrimination among services that make identical uses of local exchange facilities for identical purposes. The Commission is poised in the *VoIP NPRM* to consider the proper intercarrier compensation treatment of *all* traffic, including all VoIP traffic, that connects to the PSTN. The Commission can and should resolve the issues raised by AT&T's Petition in that proceeding. But whether the Commission resolves AT&T's petition in that proceeding or separately in this proceeding, the one thing that it plainly cannot lawfully do is single out AT&T or others for disparate treatment.

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[6] *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 4-28, rel. March 10, 2004 ("VoIP NPRM").

One electronic copy of this Notice is being submitted to the Secretary of the FCC in accordance with Section 1.1206 of the Commission's rules.

Respectfully submitted,

/s/

Judy Sello

cc: Chairman Michael K. Powell
Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Kevin Martin
Commissioner Jonathan Adelstein
Christopher Libertelli
Matthew Brill
Jessica Rosenworcel
Scott Bergmann
Daniel Gonzalez
William Maher
Jeffrey Carlisle